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No. 82-849

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

SERGIO ELEJAR MENDOZA, RESPONDENT

BRIEF OF RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals properly ruled that the United States was collaterally estopped from relitigating a question of constitutional law by the judgment of a district court in a prior case, involving the same subject matter, in which the question was resolved adversely to the United States and in which the United States voluntarily withdrew its appeal.

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REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The heart of the government's case is that it should be allowed to relitigate the respondent's naturalization petition because of special circumstances that set it apart from private litigants.

Respondent agrees that governmental interest in administration of the laws may at times

militate against the application of collateral estoppel. But what the government wants is an absolute rule to the effect that it may never be collaterally estopped from relitigating an issue of law, a proposition that is contrary to precedent and that would forever deprive the judiciary of the authority to estop the government no matter how aggravated the circumstances.

Rare and exceptional as they may be, there are instances in which the courts should be able to exercise that power in the interests of justice. This case, for the following reasons, is one of them.

1. The recent decision of this Court in Montana v. United States, 440 U.S., 147 (1979), which is fully applicable to this case, shows that the government can be collaterally estopped from relitigating issues of law,

even issues of constitutional law.

2. To justify relitigation, the government must show that estopping it would be unfair. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). The government cannot do so here because it had a full and fair opportunity to litigate the underlying issue once before, and has shown no overriding public interest against the naturalization of Filipino war veterans like Dr. Mendoza.

3. If the government were allowed to relitigate the merits of the veterans' claims, the result would be the creation of two separate classes of veterans. The first consists of those who were naturalized with the government's blessing when it withdrew its appeal in Matter of Naturalization of 68 Filipino War Veterans,

406 F. Supp. 931 (N.D. Cal. 1975), appeal withdrawn, No. 78-1832, (9th Cir. 1977), (hereinafter "68 Veterans"). The second includes those like Dr. Mendoza who continue to encounter the government's opposition even though their claims are founded on virtually the same facts and circumstances. Such unequal application of the law should be discouraged.

4. The decision below is founded upon the unique facts and circumstances of this case, which will never happen again. Consequently, the decision below will have negligable, if any, value as precedent and will not preclude the government from escaping the impact of collateral estoppel in another case involving other circumstances. Nor will it inhibit the Solicitor General from following the traditional policy of his

office with respect to the selective prosecution of appeals.

5. Contrary to the government's position, the decision in Olegario v. United States, 473 F. Supp. 185, rev'd., 629 F. 2d 204, cert. denied, 450 U.S. 980, a judgment in the government's favor, did not compel the court below to permit a relitigation of the merits in this case.

ARGUMENT

I

It is now well established that the government may be collaterally estopped in civil litigation even when an issue of constitutional law is at stake. In Montana v. United States, 440 U.S. 147 (1979), this Court precluded the government from relitigating the issue whether a state tax unconstitutionally discriminated against the federal government.

Nonetheless, the government points to

Montana for the proposition that powerful considerations militate against application of estoppel to purely legal issues, particularly issues of constitutional import. See Petition at 17. However, the language in Montana to which the government refers provides only that precluding relitigation of legal issues may be inappropriate when there are successive actions which involve "unrelated subject matter." 440 U.S. at 162. The rationale for this admonition was that it would be undesirable to allow preclusion to freeze the development of the law when "responsiveness to changing patterns of conduct or social mores" are more important. Id. at 163. But, as the Court explained, there is nothing inappropriate about prohibiting a relitigation of legal issues when the successive cases are "closely aligned in time and subject matter." Id. In fact,

it was because there was no significant difference in the two cases in Montana that the Court exhibited no reluctance in upholding the estoppel.

In this case, of course, Dr. Mendoza's naturalization application and those in question in 68 Veterans involve the very same time and subject matter. Thus, there is no reason to fear that preclusion will freeze the law in a posture that will make it unresponsive to changing patterns in society. Hence, estoppel is appropriate in this case.

The government's citation to Standefer v. United States, 447 U.S. 10 (1980), on pages 17-18 of the Petition, is inappropriate. Standefer was a criminal case and the Court's denial of estoppel was motivated largely by the concern that, in criminal litigation, the government may not have had a full opportunity to develop its case in prior litigation and, indeed, is even prohibited from challenging

a defendant's acquittal on appeal. As Standefer itself recognizes, Id. at 24, these circumstances do not apply to civil litigation like Dr. Mendoza's case. Unlike the obstacles encountered in Standefer, the government had every opportunity to present its case in 68 Veterans and to pursue its appeal from the district court's judgment. Moreover, as discussed in the succeeding section, there is no overriding public interest against the naturalization of Dr. Mendoza, and other veterans who are still able to apply, that is parallel to the deep public interest in the enforcement of the criminal law that rightly influenced this Court in Standefer.

II

In INS v. Hibi, 414 U.S. 5 (1973), the government told this court that permitting Hibi's naturalization would flood the country with claims for naturalization

by Filipino war veterans like Hibi himself. The government continued to express the very same fears at both the trial and appellate stages of 68 Veterans. 1/

Thus, the government was acutely aware that, if the district court opinion in 68 Veterans were allowed to stand, other veterans like Dr. Mendoza would naturally consider it a signal to apply for naturalization themselves. Beyond a doubt, the government's knowledge of that fact gave it every incentive to fully and vigorously pursue its appeal in 68 Veterans just as it fully and vigorously participated in the case at the district court level. As the government itself readily admits, it withdrew the appeal only after due and

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1/ See Petition for a Writ of Certiorari, U.S. INS v. Hibi, No. 72-1652, at 16-18, and the government's brief in U.S. v. 68 Filipino War Veterans, 9th Cir. No. 78-1832 at 19.

careful deliberation of all of the relevant considerations including its turnabout conclusion that the district court's decision "would not affect significant numbers of individuals" after all. 2/ See Petition at 11. Thus, it would fly in the face of reality to suggest that the government did not have a full and fair opportunity to litigate the issues.

In Parklane Hosiery v. Shore, 439 U.S. 322 (1979), this Court held that a party to a prior lawsuit may be precluded in a later case from relitigating an issue decided in the prior suit unless the

2/ The government also notes that it did not consider the district court's opinion as binding precedent. The only significance of that position would be that the government still entertained the possibility of contesting other applications in other courts. But if the government really thought at the time that it might contest other applications, the withdrawal of its appeal in 68 Veterans is certainly illogical, inconsistent, and puzzling.

application of collateral estoppel would be unfair to that party. As can be seen from the history of this litigation and the government's own admission that it withdrew the appeal in 68 Veterans after full and deliberate consideration, the government has always acted with complete awareness of the circumstances. Thus, it cannot now be heard to say that preclusion is unfair. 3/

While the government can and should be collaterally estopped when it would not be unfair to do so, it is not totally like the private litigant either. The court below recognized this when it declared

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3/ The government suggests that the fact that Dr. Mendoza spent six months in the United States in 1945-46 distinguishes his case from 68 Veterans. See Petition at 25-26. This is not so. A basic argument in 68 Veterans was that, if the special naturalization examiner had not been withdrawn from the Philippines, qualifying veterans would have had the means to exercise their opportunity to apply for naturalization. Dr. Mendoza is in this class of veterans because, if the examiner had not been

that

> courts have recognized that, as the institutionalized representative of the public interest, the government is sometimes involved in cases of far-reaching national significance, where the policies of conserving judicial resources and preventing parties from taking a 'second bite of the apple' are outweighed by societal interest in 'getting a second opinion.'

See Petition, Appendix A, at 19a.

Obviously, the government does have a generalized interest in the enforcement of our naturalization laws. However, in the context of this case, there is no societal interest that compels or even suggests a relitigation of the legal issues. This is because the case involves events which occurred some 37 years ago, events which will never happen again, and which, there-

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withdrawn, he also would have had the means to apply for naturalization when he was in the Philippines. Thus, he was injured by the withdrawal in the same way as the petitioners in 68 Veterans. The court below swiftly reached this simple conclusion. See Petition, Appendix A at 11a n. 8.

fore, will have no significant effect upon anyone other than a handful of aging veterans of World War II who, even by the government's own reckoning, were deprived of a chance to become American citizens nearly four decades ago.

III

It is apparent that the government had a full and fair opportunity to litigate the issues in 68 Veterans. It is also apparent that the government voluntarily withdrew the appeal in 68 Veterans quite freely and after full deliberation. Moreover, by withdrawing the appeal, the government conceded the validity of the district court's judgment. Now, in this case, the government wishes to repudiate its position even though circumstances remain unchanged, issues are identical, and Dr. Mendoza relied upon the judgment in 68 Veterans.

Nonetheless, to this day, the government has given no explanation for its decision to oppose further naturalization of other Filipino war veterans. The government says only that, after "thorough reexamination," the Justice Department changed its mind. See Petition for Certiorari at 12.

The practical and legal results of the government's present position are strikingly unfair. Two classes of war veterans are created: the first consists of those veterans who filed their naturalization applications before the voluntary dismissal of the appeal in 68 Veterans and who are now enjoying the benefits of their long overdue citizenship. The second includes those veterans whose circumstances are indistinguishable from the first group, but who continue to encounter the government's

determined opposition to their naturalization and who face eventual deportation if their fight is lost.

Thus, the government not only abuses, for no rational reason, the integrity of a judgment to which it had previously conceded, but would also be the direct cause of an unequal application of the naturalization law and the creator of different rules for persons in identical circumstances.

Dr. Mendoza submits that an even-handed attitude toward persons who are in the same situation is paramount in the matter of the Filipino war veterans. This is especially so where there would be nothing unfair in estopping the government.

IV

Denial of the Petition for Certiorari would not inhibit the Solicitor General from continuing to follow his practice of selectively prosecuting appeals from adverse

decisions. The government's complaint that denial of the petition "would compel the United States to reconsider this salutary practice" is highly exaggerated. See Petition at 21.

The decision to take an appeal from an adverse decision is, as a matter of practice, based largely upon the future effect of the adverse decision. In this light, the decision to appeal or not does now and always has taken into consideration possible results that are frequently indistinguishable from collateral estoppel -- for example, the result that the adverse decision will operate as precedent in a case that is indistinguishable on its facts.

Moreover, Dr. Mendoza's case rests upon unique facts and circumstances that are unlikely to arise again. Among these facts

and circumstances have been the government's own inexplicable wavering attitude toward the Filipino war veterans and its inability to show any great public interest in a relitigation of the merits.

V

Contrary to the government's assertion, the court below was not "plainly required" to permit a relitigation of the underlying issue by reason of Olegario v. United States, supra, an inconsistent decision in the government's favor. See Petition at 24.

Citing Parklane Hosiery, supra, the government says that "issue preclusion would be inappropriate when the 'judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.'" Petition at 24,(emphasis added).

What this court actually said in Parklane Hosiery, however, was:

> Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.

439 U.S. at 330. (emphasis added).

There is a big and obvious difference between the two phrases. To say that issue preclusion " would be inappropriate" in the presence of an inconsistent judgment means the courts are prohibited from applying the principle of collateral estoppel in such circumstances. However, it is equally apparent that when this court said it "may also be unfair" to estop a party in the presence of an inconsistent judgment it meant that an inconsistent judgment was only one factor among others for courts to consider in deciding whether

the application of collateral estoppel would be unfair. In short, applicability of collateral estoppel turns upon the matter of unfairness, not the presence or absence of an inconsistent judgment.

Moreover, the true import of Parklane Hosiery on this point was its reference to the foreseeability of future litigation as one of the most important factors in assessing unfairness. Id. This is because it might be unfair to estop a party who had no reason to foresee the likelihood of future litigation. On the other hand, there is nothing unfair about estopping a party, like the government in this instance, who plainly recognized not merely the likelihood but the certainty of future litigation.

CONCLUSION

The government's opposition to the

naturalization of Dr. Mendoza and other Filipino veterans of World War II is difficult to understand. Its concern that the naturalization of a relatively few war veterans who put their lives on the line in the Allied cause during World War II is all the more surprising in light of the administration's support of legislation which would grant permanent resident status to millions of aliens who have been living in the United States unlawfully. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 22, 1982.